Gifts to unincorporated associations: the significance of members being free to divide their assets

Article

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Gifts to Unincorporated Associations: the Significance of Members being Free to Divide their Assets

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This article suggests that when a donor gives a gift to an unincorporated association, the real significance of whether the association's rules allow its assets to be divided between its members is in relation to whether the gift is charitable. Whereas the widely-cited – supposed – rule in Re Grant's Will Trusts [1980] 1 W.L.R. 360 (Ch.), that a gift to a non-charitable unincorporated association is invalid unless the members are, under the association's rules, able divide its assets between themselves, is a misstatement of the law, in conflict with stronger authority.

Introduction

When a donor gives a gift to an unincorporated association – a club, society, etc. – such as a substantial legacy, the law appears to say that important consequences for the gift turn on what the rules of the association provide regarding the division of its assets between its members. The typical donor is unlikely to be aware of these technical details within the association's rules; and will certainly be oblivious to the significance the law appears to attach to them – as perhaps even many professional advisors will be. It will be argued here that, in truth, the law on this point is widely misstated. Consequences do follow from the association's rules on division, but the consequences are not as great as is generally believed. In particular, it will be suggested that the regular assertion that a gift to a non-charitable unincorporated association is invalid unless the members are able divide it between themselves is legally incorrect.

Is the gift charitable?

The real potential impact of an association's rules governing the division of its assets between its members is on whether a gift to it can be charitable. Charitable gifts to associations, of course, enjoy certain advantages – most importantly: favourable tax treatment, trusts for purposes are possible, there are relaxed rules on certainty of objects, and continuous endowments can be created in perpetuity.

In general, at least, a gift for the general purposes of an association can only be charitable – because the association itself can only be a charity – if, under the association's rules, the association members are not permitted to divide the association's assets between themselves. In *Neville Estates Ltd v Madden*, Cross J. said:[1]

> "If the gift is … one which the members of the association for the time being are entitled to divide among themselves, then, even if the objects of the association are in themselves charitable, the gift would not, I think, be a charitable gift. If, for example, a number of persons formed themselves into an association with a charitable object – say the relief of poverty in some district – but it was part of the contract between them that, if a majority of the members so desired, the association should be dissolved and its property divided between the members at the date of dissolution, a gift to the association as part of its general funds would not, I conceive, be a charitable gift."

[1] [1962] Ch. 832 (Ch.), 849-50.

This may only be a general rule: it may be subject to rare exceptions. In particular, it is accepted that mutual benefit or self-help associations restricted to the relief of poverty can be charitable.[2] It is conceivable that the rules of such an association regarding membership, funding, and distribution could provide for a division of assets between the members that would be restricted to a relief of poverty pursuant to the association's charitable purposes: the rules permitting division would then seem to be consistent with charitable status.

Otherwise, any modern well-drafted constitution of an association aspiring to charitable status will have an express clause precluding division of the association's property between the members. But in the case of other charitable associations, the prohibition may have to be a matter of inference, as it was in *Neville v Madden* itself.

What type of trust is created?

What sort of trust is created follows, of course, from whether a gift to an association is charitable or not. If the gift is charitable, the property-holding officers of the association receive it subject to a purpose trust, for the charitable purposes of the association. Given that trusts for non-charitable purposes are – in general – not possible, a gift to a non-charitable unincorporated association will have to be received by the property-holding officers of the association on a beneficiary trust instead.[3] The leading cases on the nature of these trusts are *Re Recher's Will Trusts*[4] and *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No. 2)*.[5] They show that (unless some special statutory regime applies or some other trust has been declared) property-holding officers of a non-charitable unincorporated association receive its assets on trust for its current members, as beneficiaries; whether the association exists to benefit its members or for other reasons.[6] And the members' equitable interests are subject to a contract between them formed by the association's rules, governing how the property is to be used.[7] Equitable ownership – subject to the contract – is in the current members: it is lost by those who depart and acquired by those who join in the future. The cases said it is open to the current members to depart from their contract and decide to divide the property between themselves for personal use: either by varying the contract within the rules, for example by majority vote; or otherwise unanimously, by agreeing to abandon the contract. And it is irrelevant that a donor might not foresee this.

Is a non-charitable gift valid at all?

A donor is highly unlikely to wish the members of a non-charitable association to simply divide up the gift they have given and pocket the property personally. So, when members exercise a freedom to do this, the departure from the donor's apparent intentions is regularly criticised as

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[2] *Dingle v Turner* [1972] A.C. 601 (H.L.), esp. 623.

[3] To the contrary, the suggestion is sometimes made that a wide range of non-charitable purpose trusts is validated by the case of *Re Denley's Trust Deed* [1969] 1 Ch. 373 (Ch.). However, this claim is controversial and ultimately it seems unfounded: a view the author hopes to substantiate at length elsewhere shortly.

[4] [1972] Ch. 526 (Ch.).

[5] [1979] 1 W.L.R. 936 (Ch.).

[6] Both cases reject any distinction between an "inward-looking" association (basically meaning self-serving) and an "outward-looking" one (basically meaning altruistic): [1972] Ch. 526 (Ch.), 542; [1979] 1 W.L.R. 936 (Ch.), 940.

[7] *Re Horley Town Football Club* [2006] EWHC 2386 (Ch), [118] and [128], described the trustees as holding on a "bare trust" with their only duty being to follow the association's directions (plus fiduciary duties of loyal service). The House of Lords accepted the approach of this line of cases, of equitable ownership by the members subject to a contract formed by the rules, both for general funds and outside donations, in *Universe Tankships Inc. of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366 (H.L.). In rare cases, assets are not held by trustees but are instead owned directly by the members of the association, subject to the contract between them formed by its rules: *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All E.R. 277 (Ch.).

a flaw in the present law – the law is reproached as unjust for permitting them to do this.[8] If there happened to be, fortuitously, some obstacle in the association's rules tending to inhibit the members from dividing the association's property personally – such as an outside veto – one would have expected expect that to be seen as a good thing, making it more likely the donor's intentions would be respected. Yet, strangely, the law seems to *make it a general legal requirement for the validity of a gift* that the members of a non-charitable association *must* have the freedom to divide up the gift and pocket the property personally, under the association's rules – or at least have the power to amend those rules so as to enable them to do it.

The leading case laying down this proposition is *Re Grant's Will Trusts*.[9] A testator left property "for the benefit of the Chertsey Headquarters of the Chertsey and Walton Constituency Labour Party …" This was held an invalid non-charitable purpose trust. As part of his reasoning, Vinelott J. said:[10]

> "It must, as I see it, be a necessary characteristic of any gift [on trust for the members of a non-charitable unincorporated association as beneficiaries, subject to the contract in the association's rules] that the members of the association can by an appropriate majority (if the rules so provide), or acting unanimously if they do not, alter their rules so as to provide that the funds, or part of them, shall be applied for some new purpose, or even distributed amongst the members for their own benefit."

He held this test was not satisfied, because the constituency party's rules included no power of division and gave control over their amendment to the national party.

The *formulation* of this proposition, and then its *application*, in *Re Grant*, are difficult to reconcile. Under the constituency party's rules, the national party's control over those rules and their amendment meant that it was indeed practically impossible for the members of the constituency party to divide its property between them *while applying the rules*. But the judge's stated test includes the words "or acting unanimously". The constituency party members could have unanimously agreed to abandon the rules – just as parties are free to agree to abandon any contract between them – thereby dispensing with the restrictions in the rules.[11] They therefore *did have* the power to divide the association's assets between themselves, acting unanimously. So where, as in *Re Grant*, the only identified obstacle to division between the members is in the association's rules, it should be an obstacle that can *always* be overcome. Yet the gift in *Re Grant* was held to fail. Are we to conclude that a power to unanimously agree to *vary* existing rules to provide for division (which was not within the unilateral power of the association's members in *Re Grant*, because of the national party's control over amendments) will save a gift; but the power to unanimously agree to abandon those rules to secure division (which was within the unilateral power of the association's members in *Re Grant*) – and then perhaps even replace them with a new, identical set of rules, but this time providing for division – will not save a gift? If so, this looks like a distinction without much of a difference; and if not, the decision in *Re Grant* looks wrong on the judge's own test.

Whatever the rule in *Re Grant* actually is precisely, we should enquire *why* it exists at all. But it is perhaps worth noting first that, whatever purpose the rule serves, the rule is one

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[8] See for example Peter Luxton, "Gifts to Clubs: Contract-Holding is Trumps" [2007] Conv. 274, 281, on members asset-stripping their associations. But cf. Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, C.U.P. 2020), 823-24: "[C]onsider the perhaps improbable instance of an association receiving a large gift or bequest to further its purposes whereupon the members accede to temptation and purport to dissolve the association and share out the proceeds … There is no evidence that the situation has arisen in modern times, but, were it ever to occur, might not the courts be receptive to any tenable argument that would prevent the members sharing the proceeds even where permitted by the rules of the association? … [T]he courts may baulk at … unconscionability."

[9] [1980] 1 W.L.R. 360 (Ch.).

[10] [1980] 1 W.L.R. 360 (Ch.), 368.

[11] See further Brian Green, "'Love's Labours Lost': a note on *Re Grant's Will Trusts*" (1980) 43 M.L.R. 459.

that can be easily circumvented – albeit only with the benefit of professional advice. A donor who wishes to give to a non-charitable unincorporated association whose members are emphatically barred from dividing its assets between themselves can do so by simply declaring an outside trust for the benefit of the membership, from time to time, to pay the association's expenses. Provided nothing is paid directly into the coffers of the association, nothing is received by its property-holding officers subject to a failed trust violating the *Re Grant* rule.

Origins of the rule in *Re Grant*

Why did *Re Grant* put forward this supposed rule that, in general, a gift to a non-charitable unincorporated association is only valid if its members have the power to divide its assets between them? All the supposed rule does is tend to frustrate the likely intentions of any donor: if there is no power to divide, the gift fails entirely; and if there is a power to divide, the gift may be pocketed personally by the membership. While, in any case, the law allows this general requirement of a power to divide to be circumvented by a donor with astute professional advice.

Put simply, this supposed rule is just an error. Its origins can be traced back to a nineteenth-century misunderstanding of the (then newly-emerging) rule against perpetual trusts – often also called the rule against inalienability.[12] And importantly, more and higher authority can be found *against* the supposed rule

The rule against perpetual trust correctly understood

The rule against perpetual trusts was introduced to limit the period for which a settlor could direct that an endowment they settled was to be held continuously on trust for a non-charitable purpose.[13] It was also soon applied to limit the period a donor could stipulate that a continuous endowment they gave to a non-charitable unincorporated association was to be held on trust within it.[14] It was designed to restrict the duration of these *continuous endowment* trusts: for example, where there was a stipulation that the capital of a fund given to an association be invested continuously and only the income used; or where a building was donated to an association with a stipulation that it be retained indefinitely. Quite obviously, such a rule would have nothing to say about a *simple* gift to a non-charitable unincorporated association, containing no stipulation for a continuous endowment. Or, so one would think…

Correctly understood, the rule against perpetual trusts says that if donated funds can be freely expended – or any asset donated can be sold and the proceeds freely expended – there is no issue; but if there is a stipulation that the capital or an asset be held as a continuous endowment, this element of continuous endowment must be restricted within the perpetuity period. This is how the rule was ultimately authoritatively explained by the House of Lords in the leading case of *Re Macaulay's Estate*.[15] A testatrix left property to "the Folkestone Lodge of the Theosophical Society … absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone". This was held invalid because the word "maintenance" was taken to stipulate holding a perpetual endowment. Lord Buckmaster said:[16]

> "Nor again is there a perpetuity if the Society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit … If the gift is to be for the endowment of the society, to be held as an endowment, and the society is, according to its form, perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good."

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[12] For a survey of the rule see David Wilde, "The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes" (2021) 35 T.L.I. 149 and "The Rule Against Perpetual Trusts: Part 2 – Property Holding Within Non-Charitable Unincorporated Associations" (2021) 35 T.L.I. 223.

[13] *Lloyd v Lloyd* (1852) 2 Sim. N.S. 255, 61 E.R. 338.

[14] *Carne v Long* (1860) 2 De G., F.&J. 75, 45 E.R. 550.

[15] [1943] Ch. 435n. (H.L.).

[16] [1943] Ch. 435n. (H.L.), 436. The other judgment, by Lord Tomlin, is consistent with this approach.

The rule against perpetual trust misunderstood

However, an error in the formulation of the rule against perpetual trusts – inconsistent with the authoritative statement of the rule above – had appeared earlier in the case law: to the effect that a gift to a non-charitable unincorporated association is only valid if its members have the power to divide its assets between them. And it resurfaced from time to time, until it was made the basis of the unfortunate decision in *Re Grant*.

The error traces back to *Re Dutton*.[17] In that case a testator left a gift to a subscription library, towards the fund used to pay off the mortgage on its premises. The gift was held invalid under the rule against perpetual trusts. This decision looks wrong: there was no stipulation for any continuous endowment involved. No satisfactory reason was given for the outcome. The first judgment was delivered by Kelly C.B., who seemed to believe that since the money was to be spent on a capital asset for an association that could endure perpetually – the premises – there was a violation of the rule against perpetual trusts.[18] But this overlooked the fact that the terms of the donor's gift left the association free to sell those premises and spend the proceeds. Of current interest is the second judgment, delivered by Huddleston B.[19] He said a violation of the rule against perpetual trusts arose from the inability of the members to dissolve the association in order to divide its property between themselves. He referred to the Literary and Scientific Institutions Act 1854, s. 30, by which, on dissolution the association's property would have to go to another institution. But given that the donation in the case left the association entirely free to spend the capital, on premises which they were then entirely free to sell and spend the proceeds as they wished, where was the element of continuous endowment to breach the rule against perpetual trusts? Given the differing reasoning of the two judges, the ratio decidendi of the case is unclear – for what little precedent value an apparently incorrect decision has.

After *Re Dutton*, there were recurring confused obiter dicta suggesting that a donation to a non-charitable unincorporated association would violate the rule against perpetual trusts, so as to be invalid, if the members of the association were not free to divide its assets between themselves. And, finally, that rogue proposition was applied as a decision in the *Re Grant* case. However, there was always another strand of case law that rejected this proposition. And overall, the balance of the case law is against the decision in *Re Grant*.

The misconception applied in *Re Grant* was directly rejected in its early stages, albeit obiter, by Joyce J. in *Re Swain*.[20] He said, "[I]t is not necessary, in my opinion, to the validity of such a gift that it must be in accordance with the rules of the Society, or be possible under the rules to distribute the money as or by way of bonus to the individual members".

Moreover, the decision in *Re Grant* is inconsistent with the earlier decision in *Re Ray's Will Trusts*.[21] There a testatrix's left a gift to a non-charitable convent. The convent's constitution is not fully reported but obviously that the constitution of a Franciscan convent would not provide for any division of its assets between the nuns. It is, however, reported that the constitution stated the convent was subject to the control of the Bishop.[22] So there was a position similar to *Re Grant*: there was no power in the association's rules for the members to divide its assets between themselves, and the association's rules gave to an outside authority

[17] (1878) 4 Ex. D. 54 (Ex.).
[18] His reasoning is at (1878) 4 Ex. D. 54 (Ex.), 58.
[19] His reasoning is at (1878) 4 Ex. D. 54 (Ex.), 58-59.
[20] (1908) 99 L.T. 604 (Ch.), 606.
[21] [1936] Ch. 520 (Ch.).
[22] [1936] Ch. 520 (Ch.), 523. (For confirmation of the contractually binding nature of the constitution of a religious community, see *Shergill v Khaira* [2014] UKSC 33, [2015] A.C. 359, esp. [46].)

control over any amendment of the rules. Yet Clauson J. felt no difficulty in upholding the gift. He was fully mindful of the rule against perpetual trusts, which he stated in this way:[23]

> "[I]f the frame of the gift indicates that the legacy is not to be used at once and immediately for the purposes of the voluntary society, but is to be set aside and invested and the income only to be used, the capital being preserved as an endowment of the voluntary society, the Court will not give effect to the gift because it infringes the rule that no gift except a charitable gift is to be a perpetuity, and a gift thus to endow a voluntary society necessarily creates a perpetuity."

Since there was no stipulation for a continuous endowment the gift was valid. Evidently, the – very obvious – fact that the nuns would never be able to divide the gift between themselves personally while following their constitution was seen as irrelevant. And numerous other gifts to such non-charitable religious associations have been upheld, despite their constitutions – equally obviously – making them subject to outside restraint by affiliation, effectively preventing the association's members dividing its property between themselves.[24]

Most importantly, the ruling in *Re Grant* is inconsistent with the earlier authoritative statement of the rule against perpetual trusts by the House of Lords in *Re Macaulay*, set out above. That statement of the rule made it crystal clear that all the rule requires is sufficient freedom to *spend* a gift – not *divide* it:[25] "Nor again is there a perpetuity if the Society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit…"

So, we can say the decision in *Re Grant* was reached *per incuriam* – without consideration of clear, and higher, authority to the contrary. As such, it should not be followed.

Re Grant as a purported application of the rule against perpetual trusts

Some have not appreciated that the ruling in *Re Grant* was a purported application of the rule against perpetual trusts – given Vinelott J. made no reference to that rule in the crucial passage of his judgment quoted above, laying down the requirement that a non-charitable association's members must be free to divide its assets for a gift to the association to be valid. They see this *Re Grant* requirement as a free-standing one, unconnected with perpetuity – although the requirement then makes equally little sense understood in this way.[26] However, the proof that Vinelott J. had the rule against perpetual trusts in mind when laying down the *Re Grant* requirement occurs several pages earlier in his judgment,[27] where he adopted this misstatement of the rule against perpetual trusts by Cross J. in *Neville v Madden*:[28]

> "[I]t may be a gift [on trust for the members of a non-charitable unincorporated association as beneficiaries, subject to the contract in the association's rules] … If this is the effect of the gift, it will not be open to objection on the score of *perpetuity* or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity."

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[23] [1936] Ch. 520 (Ch.), 524.
[24] See for example the review of authorities in *Re Smith* [1914] 1 Ch. 937 (Ch.).
[25] [1943] Ch. 435n. (H.L.), 436.
[26] David Wilde, "The Rule Against Perpetual Trusts: Part 2 – Property Holding Within Non-Charitable Unincorporated Associations" (2021) 35 T.L.I. 223, 237-38.
[27] [1980] 1 W.L.R. 360 (Ch.), 365.
[28] [1962] Ch. 832 (Ch.), 849. Emphasis added.

And the Court of Appeal has since confirmed that the *Re Grant* requirement is, indeed, a purported application of the rule against perpetual trusts, in *News Group Newspapers Ltd v SOGAT 1982*.[29]

As a purported application of the rule against perpetual trusts, the *Re Grant* requirement has confused judges into accepting some quite bizarre ensuing consequences. First, that even the general funds of an association raised by membership subscriptions may be held by the property-holding officers of the association on an invalid, perpetual trust. In *Re Grant*, Vinelott J. believed that membership subscriptions would not be affected by the requirement he laid down – although he gave no adequate reason why.[30] But in *News Group v SOGAT*, above, the Court of Appeal accepted that the *Re Grant* requirement did apply to funds raised from membership subscriptions – the only funds in issue in the case – although the requirement being satisfied, nothing was invalidated there. But an association did lose funds raised from membership subscriptions, applying the *Re Grant* requirement, in *Re St Andrew's (Cheam) Lawn Tennis Club Trust*.[31] Funds of a tennis club were used to purchase land subject to an invalid declaration of trust. It was held the funds could not return to the association through a resulting trust, on the failure of the declared trust, due to the *Re Grant* requirement[32] – because under (what were assumed to be) the club's rules, on its termination its property fell under the control of the church it was associated with; and the rules could only be changed with the consent of the church. Arnold J. held the contribution of the club went on resulting trust to the major contributor to the failed land trust instead. Secondly, it has been assumed that the *Re Grant* requirement invalidates a gift even if any element of continuous endowment stipulated for in the gift is expressly limited to the perpetuity period: *Re Horley Town Football Club* .[33] So, we seemingly have a perpetuity rule that cannot be complied with by an express limitation to the perpetuity period!

Given the outlandish nature of the *Re Grant* requirement, it is unsurprising to find it being effectively ignored. *Panton v Brophy*[34] rejected a suggestion that a violation of the rule against perpetual trusts was involved when an association's rules provided its funds could not be distributed to its members. Lip service was paid to the *Re Grant* requirement.[35] But it was held not to invalidate anything on the ground that – even though this was not true of the rowing club in *Panton v Brophy* itself – some non-charitable unincorporated associations may be outward-looking, conferring no personal benefits on their members, yet can validly receive property: carrying the implication that personal benefit cannot be an essential ingredient. Following this logic, the *Re Grant* requirement should *never* be applied. It would, of course, be more straightforward to come out and say that the proposition in *Re Grant* is simply wrong, rather than to sidestep it in this way.

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[29] [1986] ICR 716 (C.A.), 721 (Lawton L.J.) and 727 (Glidewell L.J.). Unfortunately, the Court of Appeal wrongly assumed that the *Re Grant* requirement was an accurate statement of the rule against perpetual trusts. Fortunately, we have the higher authority of the House of Lords in *Re Macaulay*, above, as to the correct test.

[30] [1980] 1 W.L.R. 360 (Ch.), 374.

[31] [2012] EWHC 1040 (Ch), [2012] 1 W.L.R. 3487, esp. [57]-[63].

[32] Although *Re Grant* itself was not cited to the judge: he relied instead on the passage quoted in *Re Grant* from *Neville v Madden* – set out above – that equates the inability of members to divide a donation to an association with a perpetual trust.

[33] [2006] EWHC 2386 (Ch), [2006] W.T.L.R. 1817. Lawrence Collins J. held the *Re Grant* requirement was satisfied, despite the conferral of outside voting rights by the association, so nothing was invalidated in the end: [116]-[117].

[34] [2019] EWHC 1534 (Ch), [2019] L.&T.R. 24, [89].

[35] Although *Re Grant* itself was not mentioned, the misstatement of the law it had taken from *Neville v Madden* being cited instead.

Conclusion

When an unincorporated association receives a gift, the rules of the association about the division of its assets between its members do have a significance. In general, at least, a gift can only be to a *charitable* association if the association's rules do not allow its members to divide the association's assets between themselves. However, the supposed rule in *Re Grant* that a gift to a *non-charitable* unincorporated association is invalid unless the members are able divide it between themselves is simply wrong: it was the revival of an old error in the rule against perpetual trusts (also called the rule against inalienability). That rule, properly understood, including on House of Lords authority, required only that there must be sufficient freedom to *expend* a gift within the framework of the association – not *divide* it personally.[36] Errors in case law can often stubbornly persist – even when the mistake is tolerably clear. One may have to wait a long time for a suitable case raising the issue involved to be litigated; then hope that it is argued by astute counsel and decided by a court with insight and the courage to overturn a past precedent. In the meantime, the error can only be exposed and understood for what it is.

[36] For whether the rule correctly applies *at all* to gifts to non-charitable unincorporated associations today – although the courts clearly assume it does – see David Wilde, "The Rule Against Perpetual Trusts: Part 2 – Property Holding Within Non-Charitable Unincorporated Associations" (2021) 35 T.L.I. 223, esp. 230-33.